



Ethics and Professionalism for State Tax Administrators

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Via Webcast

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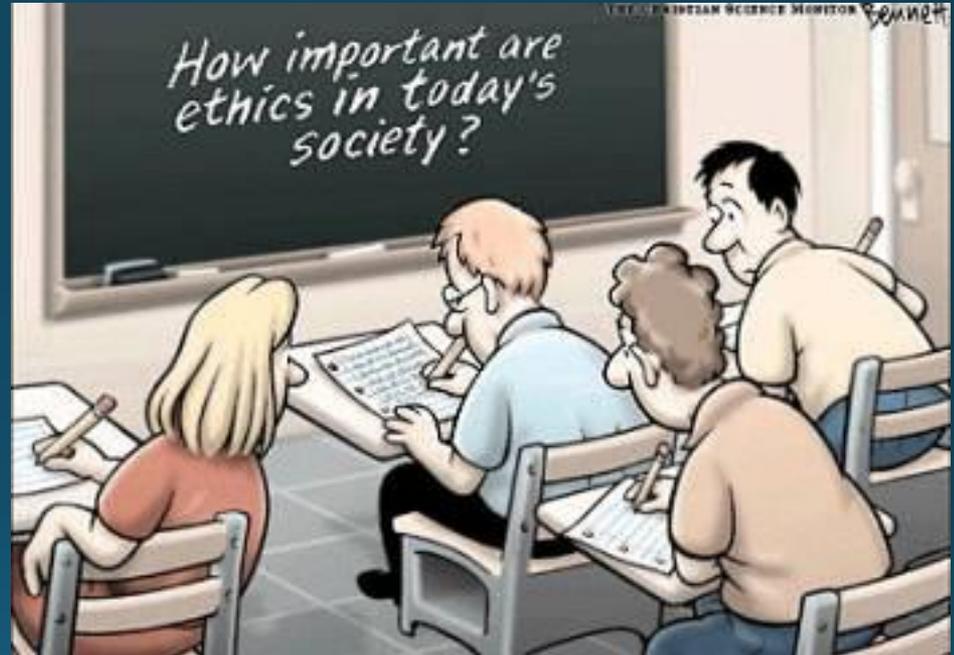
Outline

1. What are ethics and how is ethical behavior defined?
2. Sources of guidance – mandatory and aspirational
3. Ethical responsibilities in representing the public
4. Particular circumstances: audits, assessments, dispute resolution, and litigation
5. The duty to maintain confidentiality, and authorized information exchange

What are ethics?

Ethics are the set of “principles of conduct or behavior governing an individual or a group (as the members of a profession).” *Merriam-Webster’s Collegiate Dictionary*.

OR—*what you do when no one is looking*



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Definitions & General Comments

Professionalism: The conduct, aims, or qualities that characterize or mark a profession or a professional person.

The public expects its servants to act ethically and professionally not just during work hours but at all times, including on social media sites, at home, and at play. There is no time when we will not be judged as professionals and as public employees.

Sources of Legal Standards Affecting Tax Professionals



- Professional standards (ABA Model Rules, AICPA SSTS)
- Standards of conduct for state employees and revenue departments
- Treasury Circular 230
- Civil penalties
- Criminal sanctions
- Taxpayer bill of rights

Government-Imposed Rules

- Common state-specific rules of applicable to government and revenue department employees
- Acceptance of honoraria, meals, speaking engagements, etc
- Conflicts of Interest
 - taking outside employment
 - preparing tax returns
 - appearing before agency
 - representing taxpayer on matter in which you were involved
- Improper use of state resources
- Confidentiality

Rules of Professional Organizations

- American Bar Association

http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents.html

- American Institute of CPAs

<http://www.aicpa.org/Research/Standards/Tax/Pages/default.aspx>

- Professional Oaths - e.g., California Attorney's Oath

http://www.calbarxap.com/applications/CalBar/PDFs/code_section_6068.pdf

- Institute for Professionals in Taxation

<http://www.ipt.org/learncenter.asp?id=178410&page=29>

- Tax Executives Institute

<http://www.tei.org/membership/Pages/StandardsofConduct.aspx>

Purpose and Function of Ethics Codes

- Reflect organizational values
- Articulate principles and standards
- Advise members of acceptable/unacceptable conduct
- Protect clients, members of the public, and the integrity/reputation of the organization or profession
- Assist members in identifying ethical issues and provide framework for resolution



8

CLE/CPE Credit Response

How often does your state revenue department or attorneys general office provide training on the state's codes of conduct?

E-mail answers now to: events@mtc.gov

(If you are part of a group, please identify all participants.)

Personal Convictions

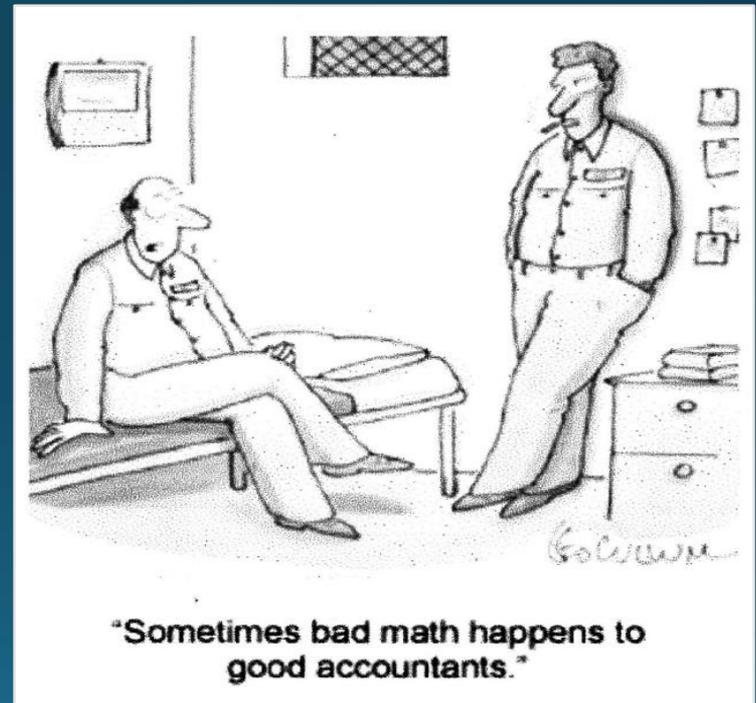
- Individual Moral Code
 - Often the first level of scrutiny of a potential action
- Individual Character
 - Internal moral barometers
 - Only the starting point; must navigate the whole framework
- Disincentive of Public Disclosure
 - “What-would-your-mother-say” test
 - “*Wall Street Journal*” Test

How Ethical Violations Occur: *the problem of slippery slopes*

It's almost always incremental...

Sometimes enabled by a sense that others are "getting away with it" or that you have been treated unfairly compared to others.

Maintaining employee morale generally and sense of common mission and purpose are critical to preventing lapses.



Discussion Examples

You are auditing a large corporation for the second time. You have developed a good working relationship with the tax manager. What would you do if:

- You both go down to the company's cafeteria for lunch, and the manager says *"I've got this"* at the cash register?
- The manager suggests that you join some of her colleagues for dinner since you might like some company, and again, offers to pick up the check?
- The manager compliments your work and mentions she might have a position open in the company next year.
- The manager mentions that responding to your IDR would interfere with her vacation plans, so could we just let that minor issue drop...for now?

CLE/CPE Credit Response

Ethical lapses often result from going down something called a S _ _ _ _ _ S _ _ _ _ _
(rhymes with snickery spoke).

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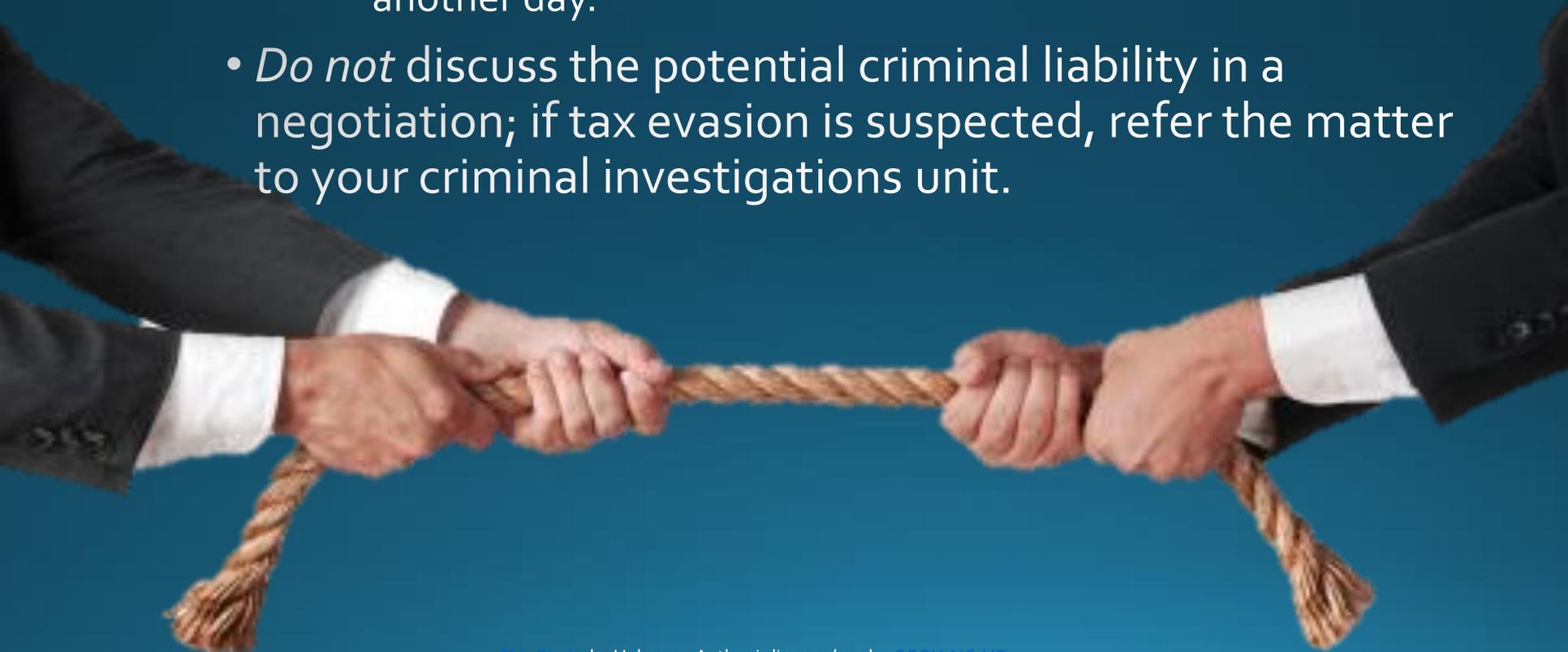
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The Role of a Public Sector Advocate

- ***Tax Administrator's Paradox:*** Government officials “are expected to be dispassionate interpreter[s] of the law and dispensers of aid and succor to the bewildered taxpayer” and . . . they are [also] “the collector[s] of revenue and enforcer[s] of the law and the adversar[ies] in court proceedings.” (*Quotations from Leonard Kust, former TEI President and drafter of TEI's Standards of Conduct, 1962*)
- ***Our role is not to enhance revenue collection***
- ***But neither can we be the arbiters of the fairness of tax laws***

Dispute Resolution

- Is there a “principled” resolution that can be reached (rather than a dollar amount)?
 - Settling on a percentage basis may just put off resolution for another day.
- *Do not* discuss the potential criminal liability in a negotiation; if tax evasion is suspected, refer the matter to your criminal investigations unit.



Dispute Resolution

- *Do not* use potential for adverse publicity as a negotiating tactic
- *Do not* use state's superior financial or legal resources as a negotiating tactic
- *Do not* agree to terms contrary to state's laws
- *Do* negotiate with transparency
- *Do* seek to de-personalize negotiations: it's not about you and her



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Problems for Consideration: *Mistakes of Fact*

You have negotiated over the course of many months and are entering into a written settlement. You feel like the taxpayer has gotten “too good a deal” on one issue but you didn’t have the resources to pursue the matter further. Prior to sending the agreement to the taxpayer, you are informed of a significant calculation error in the state’s favor on another issue.

What should you do?

- Would your answer change if the taxpayer had signed the agreement and returned it to you?

Problems for Consideration: *Mistakes of Law*

A taxpayer files a petition challenging an assessment and raises three defenses you know will go nowhere. But reviewing the file, you realize the taxpayer could have made an entirely different argument that would possibly convince the hearing officer to abate the assessment.

What should you do?

- Would your answer change if the taxpayer was represented by counsel?
- Would your answer change if the taxpayer was a large business entity?

CLE/CPE Credit Response

What are the two kinds of mistakes that a taxpayer might make in presenting their case that would then present a potential ethical issue for the state's advocate?

(Hint: One starts with F and the other starts with L.)

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Multistate Information Sharing

Helen Hecht, General Counsel
Multistate Tax Commission

Topics

- Confidentiality generally
- Federal FTI
- State confidentiality generally
- State information sharing generally
- The uniform exchange of information agreement
 - Formal requests
 - Informal/voluntary information exchange
- Questions



Confidentiality

- Essential to a voluntary tax system.
- Not only the information that the taxpayer provides – but information concerning agency activities (especially audits).
- At its core – it is about access to information and limits on that access:
 - Who may have access, and
 - For what purpose.



IRS Has Its Own Rules

- IRC Sec. 6103 – taxpayer return information (so-called FTI) includes:
 - A taxpayer's identity (when associated with particular information).
 - The nature, source, or amount of the taxpayer's income, payments, receipts, deductions, exemptions, credits, assets, liabilities, net worth, tax liability, tax withheld, deficiencies, overassessments, or tax payments, whether the taxpayer's return was, is being, or will be examined or subject to other investigation.



IRS Has Its Own Rules

- FTI also includes:
 - Any other data, received by, recorded by, prepared by, furnished to, or collected by the Secretary with respect to a return or with respect to the determination of the existence, or possible existence, of liability.
 - Any part of any written determination or any background file document relating to such written determination.
 - Any advance pricing agreement entered into by a taxpayer and the Secretary and any background information related to such agreement or any application for an advance pricing agreement.

Heightened Sharing Controls for FTI

- Because of the IRS rules governing FTI, states must observe heightened controls (“safeguards) over FTI obtained under agreements with the federal government.
- See IRS publication 1075 and other IRS information - <https://www.irsvideos.gov/Governments/Safeguards/ProtectingTaxInformation>
- The agreements between the IRS and the states also permit sharing with other states that have agreements and are in compliance.
- States take the position that FTI is only information that *comes from* the IRS.

CLE/CPE Credit Response

What is another name for the type of controls the IRS imposes on the states in order for them to be eligible to share information?

(Hint – it starts with S A F E _ _ _ _ _ _ _ _).

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State Confidentiality

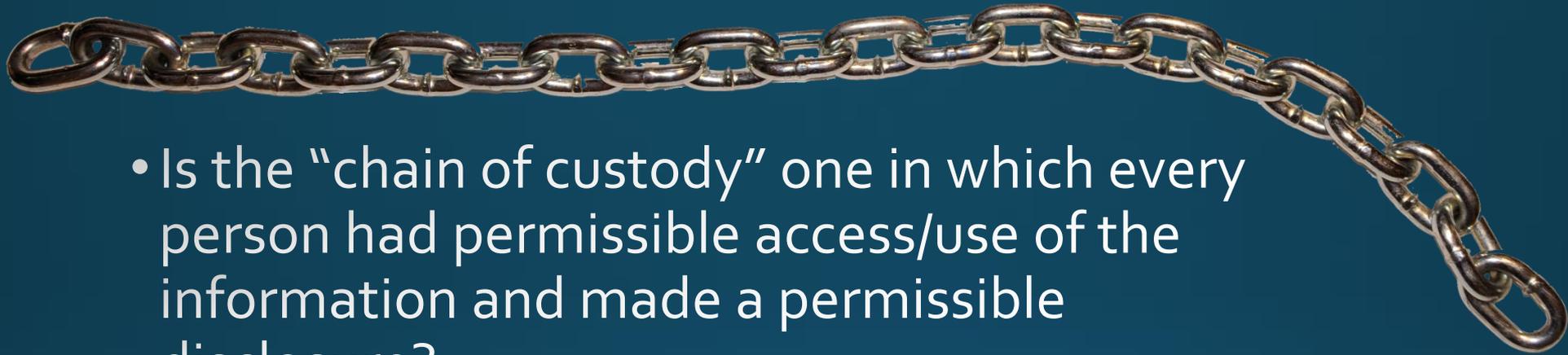
- Every state also has statutory restrictions on the use (access) and disclosure of taxpayer information provided to that state.
 - Use or access – only for authorized purposes
 - Processing, audit, collections, assistance, etc.
 - Disclosure – only to those authorized to receive and only for an authorized purpose.
 - Recipients of the information are bound by the state's statutory requirements on use and disclosure.
 - Most statutes require information sharing to be done pursuant to a "written agreement."
- Every state provides for criminal penalties for unauthorized use or disclosure.

Considerations

- Highest common denominator –
 - Some states' rules are more restrictive or stringent when it comes to disclosing information.
- Think about the state/agency to which the information “belongs” – that is – which agency received the information from the taxpayer for a legitimate tax administration purpose?



Considerations



- Is the “chain of custody” one in which every person had permissible access/use of the information and made a permissible disclosure?
- Whoever has the information as a result of that “chain of custody” is bound by the rules of the state/agency to which the information “belongs.” (Including any criminal penalties.)

State-to-State Sharing

- Uniform Exchange of Information Agreement – 1/1/93 (UEIA)
- Available to state officials on the FTA website – taxadmin.com.
- Was instituted to take the place of numerous general bi-lateral information sharing agreements.
 - But not to replace certain existing special-purpose arrangements that were ongoing.
- MTC is a tax agency and signatory to the agreement. (FTA is not and employees of FTA do not receive confidential taxpayer information.)

State-to-State Sharing

- UEIA –
 - Anticipates two general forms of sharing
 - “Formal” or ad-hoc requests from tax officials of one state to those of other states;
 - “Informal” or “voluntary” disclosure as part of an established exchange procedure.
 - For the former – it sets up a system so that officials of the receiving state will be able to confirm the request is coming from a legitimate source.
 - Also – the UEIA satisfies the requirement for a “written agreement” for both.

Formal (Ad-Hoc) Requests Under UEIA

- The agency must be signatory.
- The agency must provide primary contact (disclosure officer), statutes, and employees authorized to make/receive information.
- Formal requests must specify, to the extent possible, the information sought.
- The agreement itself constitutes a request for information that may be relevant to a state, “when practical.” (Art. IV(1)(A).)

Informal or Voluntary Sharing

- The information must be shared according to an established exchange procedure.
 - What procedure? Practices followed to ensure –
 - Sharing (use/access) is for allowable purposes,
 - Recipients are authorized, and
 - Information is otherwise protected.
- Other rules apply (recipient is bound by the rules of the state providing the information, etc.)

Examples of Established Exchange Procedures

- FTA states participating in various programs (tobacco enforcement, suspicious filers program, etc.).
- State-to-state groups that regularly share information based on a compliance program in which they agree to participate (SEATA).
- MTC's joint audit program.



Question No. 1

Two auditors from different state agencies are at a tax conference and one tells the other, confidentially, about an audit she is conducting of a taxpayer and the issues she is dealing with. Neither auditor is authorized under the UEIA to request or disclose confidential information. Can that auditor share the identity of the taxpayer?



Answer

- No.
- Why – because the auditors are not engaging in an exchange of information pursuant to an established exchange procedure.

Question No. 2

Same facts as in Question 1, except that the auditors are at an MTC audit committee meeting. Can that auditor share the identity of the taxpayer?



Answer

- Probably not – unless the purpose of sharing the identity of the taxpayer is related to the conduct of the joint audit program.
- Why – because the identity of the taxpayer, while shared in the context of the audit committee (which is part of an established exchange procedure), is not information related to the purpose of the joint audit program.

Question No. 3

A state tax auditor has properly obtained information about a taxpayer from another state for use in the audit of that taxpayer. Under laws of the auditor's state, this information may be disclosed to attorneys working for the AG's office handling tax cases for the agency to get advice concerning the audit. May the auditor share the information obtained from the other state (including the taxpayer's identity) with an attorney at the AG's office?

Answer

- It depends. Some states allow sharing of information outside the agency (to AGs or others representing the agency) only in the context of litigation, and only when there is an ongoing active case. Because the information “belongs” to the other state, it is the rule in that state that would control.

Question No. 4

- The audit director for State A is involved in negotiations with the tax director for Company X. At the end of those negotiations, X's tax director mentions he had a difficult negotiation on a similar issue with an attorney in State B. The tax director then comments, "I didn't give State B as good a deal as I'm giving State A—because that attorney was a jerk." Assume the audit director and the attorney are both authorized to request and disclose information under the UEIA. Can the audit director volunteer the information to the attorney?

Answer

- If the auditor believes it would be useful to the attorney for a tax administration purpose, yes. (Remember, the UEIA constitutes a standing request for information that another state knows might be useful to that state.) But if the auditor has no reason to believe the information would be useful for tax administration, then no.

Question No. 5

- Same facts as Question No. 4. But assume that the attorney in State B asks the audit director in State A what information State A obtained from the taxpayer during negotiations with that taxpayer. Must the audit director respond?

Answer

- No. Even though the UEIA refers to “voluntary” disclosure of information, that only describes disclosures where there is no formal request. But all disclosures are voluntary in the sense that no official of one state is obligated under the UEIA to disclose information to another state.

FINAL CLE/CPE Credit Response

What is the name of the multilateral agreement that the states have entered into to share confidential information?

(Hint: the initials are UEIA.)

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